Office - Supreme Court, U.S.
FILED
SEP 10 1984
ALEXANDER L. STEVAS.
CLERK

No. 84-50

In the Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, PETITIONERS

v.

DIANA L. SPIRT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

25 pp

QUESTIONS PRESENTED

1. Whether the relief mandated by the courts below is appropriate.

2. Whether petitioners are "employers" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b).

3. If petitioners are employers, whether the McCarran-Ferguson Act, 15 U.S.C. 1012(b), precludes application of Title VII to the retirement plans petitioners offer.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	13
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Arizona Governing Committee v. *Norris*, No. 82-52 (July 6, 1983)	*passim*
Bartels v. *Birmingham*, 332 U.S. 126	16
Berenyi v. *Immigration Director*, 385 U.S. 630	14
Cochran v. *Paco, Inc.*, 606 F.2d 460	19
EEOC v. *Wooster Brush Co.*, 523 F. Supp. 1256, aff'd in part and rev'd in part, 727 F.2d 566	19
Falk v. *Brennan*, 414 U.S. 190	16
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	14
Hannahs v. *New York State Teachers' Retirement System*, 26 Fair Empl. Prac. Cas. (BNA) 527	19
Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702	7, 10
NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111	16
Peters v. *Wayne State University*, 476 F. Supp. 1343, rev'd, 691 F.2d 235, vacated and remanded, No. 82-794 (July 6, 1983), remanded, 718 F.2d 1100	16, 19
Women in City Government United v. *City of New York*, 515 F. Supp. 295	19

Statutes:

Civil Rights Act of 1964, Tit. VII, as amended, 42 U.S.C. (& Supp. V) 2000e *et seq.*	2
§ 701(b), 42 U.S.C. 2000e(b)	16
§ 708, 42 U.S.C. 2000e-7	10, 18
McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*	8
§ 2(b), 15 U.S.C. 1012(b)	18
Truth in Lending Act, 15 U.S.C. 1601 *et seq.*	19

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-50

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, PETITIONERS

v.

DIANA L. SPIRT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-9a) is reported at 735 F.2d 23. An earlier opinion of the court of appeals (Pet. App. 11a-37a) is reported at 691 F.2d 1054. The district court's opinion of July 1, 1976 (Pet. App. 43a-54a) is reported at 416 F. Supp. 1019; its opinions of August 9 and September 12, 1979 (Pet. App. 55a-92a) are reported at 475 F. Supp. 1298; its opinion of March 19, 1982 (Pet. App. 93a-142a) is reported

at 93 F.R.D. 627; and its opinion of January 23, 1976 (Pet. App. 39a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a-144a) was entered on May 21, 1984. The petition for a writ of certiorari was filed on July 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Diana Spirt, a tenured professor at Long Island University (LIU), a private educational institution, brought this action in the United States District Court for the Southern District of New York in 1974. She alleged, inter alia, that petitioners' use of sex-segregated mortality tables, which result in the payment to women of lower monthly retirement benefits than are paid to similarly situated men, violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* The Equal Employment Opportunity Commission intervened in this case in 1982 (Pet. App. 99a).

Petitioners are nonprofit organizations, incorporated in the State of New York, that provide retirement and insurance plans for the employees of educational institutions, including LIU (Pet. App. 13a, 56a). Participation in petitioners' plans is limited to colleges, universities, independent schools, and other nonprofit educational or research institutions (*id.* at 56a). Petitioner Teachers Insurance and Annuity Association (TIAA), organized in 1918 by the Carnegie Foundation for the Advancement of Teaching, offers what are in form fixed annuities for retirement

plan participants. Petitioner College Retirement Equities Fund (CREF), a companion corporation, was established in 1952 to permit investment in common stock; CREF offers plan participants variable annuities. *Id.* at 13a-15a. By 1977, more than 85% of all private, four-year colleges and universities and more than 40% of all public colleges and universities had adopted retirement plans managed by petitioners (*id.* at 13a). At that time, more than 400,000 employees of approximately 2,800 participating institutions were covered by the TIAA-CREF system (*ibid.*).

Participation by educational institutions in the TIAA-CREF system is "normally established by a resolution of the board of trustees of a participating institution" (C.A. App. 173). In 1955, the trustees of LIU passed a resolution adopting the TIAA-CREF plan at issue here and establishing the conditions under which university employees would participate in the plan (Pet. App. 56a-57a; C.A. App. 188-193). The resolution requires that tenured faculty members like respondent Spirt participate in the LIU plan (Pet. App. 13a; C.A. App. 188). Each employee must contribute 5% of his or her salary to the plan; LIU contributes an additional sum in the amount of 5% of the first $4,800 of an employee's yearly salary and 11% of yearly earnings in excess of $4,800 (Pet. App. 14a).

Petitioners accumulate and invest contributions forwarded by LIU to employees' accounts. When an employee is qualified and wishes to begin receiving annuity benefit payments (generally at retirement), he or she "settles" his or her contract with petitioners (C.A. App. 176-177). At the point of settlement, all similarly situated TIAA-CREF annuitants, male or

female, have identical accumulations (*id.* at 178). Each employee, in return for the contributions forwarded to petitioners on his or her behalf, receives an individual contract: a TIAA Deferred Retirement Annuity Contract (*id.* at 174, 194-199) or a CREF Deferred Retirement Unit-Annuity Certificate (*id.* at 174, 502-507).

Petitioners have historically used sex-based mortality tables in calculating the benefits participants receive from annuities, because women as a class live longer than men (Pet. App. 57a). As a result, "female participants in the plans receive smaller monthly [retirement] payments than male participants of the same age, years in the plans, salary, and rate of contribution" (*ibid.*). However, prior to settlement of an employee's account petitioners make no contractual commitment (with one exception that has no practical significance, see pages 5-6, *infra*) to distribute benefits to annuitants on a sex-differentiated basis (Pet. App. 5a-6a, 34a-36a, 87a & n.28, 89a-90a).

The CREF deferred annuity certificates contain no guaranty that the annuitant will receive any dollar amount in future benefits or that future benefits will be distributed on a sex-differentiated basis (C.A. App. 502-507). CREF specifically informs participants that it provides no dollar guaranties with respect to annuity payments and assumes no investment risk (Weyand Affidavit, Exh. OO, at 1; C.A. App. 502).[1] CREF certificates provide that each premium

[1] "Weyand Affidavit" refers to the affidavit of Ruth Weyand, attorney for the EEOC, filed in the court of appeals in support of the EEOC's motion to reinstate judgment.

purchases "Accumulation Units," which at settlement can be either (1) exchanged for "Annuity Units" that will provide a variable annuity or (2) used to purchase a TIAA annuity (C.A. App. 502-504). CREF does not promise that sex-based mortality tables will be used in converting "Accumulation Units" to "Annuity Units" or in calculating benefits payable by TIAA annuities (Pet. App. 87a & n.28, 89a-90a & n.4).[2]

Petitioner TIAA is also able to distribute benefits to retirees on a sex-neutral basis without violating any contractual commitment. Unlike the CREF certificate, the TIAA Deferred Annuity Contract contains a sex-differentiated contractual commitment, in the form of a rate schedule setting forth annual dollar amounts of single life annuity benefits that specified contributions will ultimately provide to recipients, according to sex and retirement age. However, the dollar amounts that appear in that rate schedule are calculated on the basis of a 2-½% annual return on the contribution amount. Because this guaranteed return on investment is far below TIAA's actual rate

---

[2] The only certificate provision relating to the number of Annuity Units obtained is that "[t]he number of Annuity Units and their current dollar value will be determined in accordance with the Rules of the Fund, using actuarial methods" (C.A. App. 504). The deferred annuity contracts specifically provide that the Trustees of CREF may amend or add to the Rules of the Fund from time to time (*id.* at 506). Pursuant to this provision, the trustees on several occasions have altered the formula for converting Accumulation Units into Annuity Units by changing the mortality table used (*id.* at 513, 546-549; EEOC Statement, Exh. AAA at 1-2). "EEOC Statement" refers to the Statement of EEOC of Material Fact as to Which No Genuine Dispute Exists, filed in the district court.

of return on investments, the guaranteed rate has no practical significance. Pet. App. 35a; C.A. App. 582-585. TIAA has acknowledged that "all TIAA payout contracts issued since 1941 are receiving total payments in excess of contractual guarantees" (EEOC Statement, Exh. P, letter of TIAA/CREF to EEOC, Apr. 10, 1980, at 2, para. 3).

The TIAA guaranteed rate schedules have been effectively displaced by two features of the TIAA system: (1) the use of a single premium immediate annuity (SPIA) rate as the basis for the settlement guaranty at the time of retirement (C.A. App. 583) and (2) the calculation of "total benefit payments" by a dividend formula (*id.* at 584-586; Weyand Affidavit, Exh. QQ, Answers 42(a) and (b) and 48 of TIAA to Spirt Interrogatories). Each TIAA deferred annuity contract issued since January 1, 1948, has contained a "more favorable payment" provision, which entitles the participant to receive periodic benefits at the then-current rate for single premium immediate annuities issued by TIAA if at the time of settlement the SPIA rate provides higher benefits than the guaranteed rate schedule (C.A. App. 197, 198, 199, 501, 582-583; EEOC Settlement, Exh. N, letter of TIAA/CREF to EEOC, Feb. 19, 1980, at 1, para. 1). For more than 20 years the SPIA rate has been higher than the guaranteed schedule rate (C.A. App. 582-585, 595-598). Although TIAA in practice has calculated the SPIA rates on the basis of sex-differentiated mortality tables, it has made no contractual commitment to use sex-differentiated rates. See EEOC Statement, Exh. N, letter of TIAA/CREF to EEOC, Feb. 19, 1980, at 2-4; Pet. App. 5a-6a, 34a-35a.

Moreover, for more than 20 years TIAA earnings have so greatly exceeded the SPIA rate that the

actual amount of periodic benefits TIAA pays to all retirees has been computed on the basis of a dividend formula adopted on an ad hoc basis each year. Although each benefit check designates a portion of the amount of the check as representing guaranteed benefits and the remainder as dividends, the total is actually computed by use of the dividend formula without reference to either the rate schedule guaranty or the SPIA guaranty. C.A. App. 584-586, 595-598; and see tables at *id.* at 528-529, 531-533. Use of the dividend formula has resulted in payment of benefits greatly in excess of those provided by either the rate schedule or the SPIA rates (*id.* at 585-586, 595-598).[3] Although TIAA in the past has used sex-based mortality tables as a basis for distribution of dividends (C.A. App. 182, 200), there is no contractual provision that requires it to do so. See Pet. App. 5a-6a, 34a-35a, 87a & n.28.

2. In 1979, the district court granted summary judgment in favor of respondent Spirt against LIU and petitioner CREF (Pet. App. 55a-92a, 147a-148a). The court held, on the basis of this Court's decision in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), that LIU and CREF had violated Title VII by using sex-segregated mor-

[3] TIAA's net rate of return on total invested assets has increased each year since 1953, from 3.48% in 1953 to 10.73% in 1982 (C.A. App. 592; EEOC Statement, Exh. AA, 1978 Annual Report at 17; Weyand Affidavit, Exh. GG, 1979 Annual Report, at 12; Exh. HH, 1980 Annual Report at 5; Exh. II, 1981 Annual Report at 9; Exh. JJ, 1982 Annual Report at 12). The dividends paid by TIAA in 1980 were so large that the typical participant who retired within the preceding 10 years received benefit payments that were 90% to 180% more than the rate schedule guaranty (compare lines 1 and 6 at C.A. App. 595-598; and see *id.* at 584-585).

tality tables that resulted in payment of lower monthly retirement benefits to women than to similarly situated men (Pet. App. 68a-71a).

The district court found that LIU and other educational institutions had "delegated their responsibility for and control over employee annuity plans to TIAA and CREF;" that such plans were an "aspect of employee compensation;" and that petitioners were therefore employers within the meaning of Title VII (Pet. App. 71a-73a). The court also held (*id.* at 57a-64a) that TIAA, although otherwise an employer within the meaning of Title VII, was in the "business of insurance" and therefore was insulated from Title VII liability by the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* Since CREF assumed no investment risk, the court held that it was not in the business of insurance for purposes of the McCarran-Ferguson Act and was therefore subject to Title VII (Pet. App. 61a).

The district court postponed implementation of relief until the end of the then-current school year (Pet. App. 87a-88a). The court enjoined CREF from using sex-segregated mortality tables in calculating annuity benefits for persons who retire on or after May 1, 1980 (*id.* at 86a, 88a, 148a). In addition, it enjoined LIU from contributing to, or requiring its employees to contribute to, on or after June 1, 1980, any retirement program that uses sex-segregated mortality tables in calculating periodic benefits for persons who retire after that date (*ibid.*).[4] The court found that no male had any

[4] Petitioners' compliance with the injunctive provisions of the district court's orders and judgment has been stayed pending appeals through a series of stipulated orders. The order of March 29, 1982, provides that if the judgment is

contractual right to have sex-differentiated tables used for conversion of CREF accumulation units into annuity units and that the remedy was not inequitable because no male had any fixed expectations as to the amounts he would receive as benefits from CREF (*id.* at 87a & n.28, 89a-91a). The court also concluded that its order was not impermissibly retroactive within the meaning of this Court's decision in *Manhart*, because "the relief granted in [this] case will not involve any unanticipated payments by CREF which would force it to meet unchanged obligations with diminished assets. Rather the relief granted in this case will merely vary the future allocation and distribution of an unaffected amount of assets." Pet. App. 89a.

3. The court of appeals affirmed the district court's holding that petitioners' use of sex-distinct mortality tables violated Title VII (Pet. App. 19a-24a). It agreed as well "that [petitioners], which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities (in this case LIU), that they must be deemed an 'employer' for purposes of Title VII" (Pet. App. 24a).

The court of appeals affirmed the district court's holding that CREF, as a variable annuity company, was not in the business of insurance within the meaning of the McCarran-Ferguson Act (Pet. App. 26a-27a). However, it reversed the district court's holding as to TIAA. The court of appeals concluded

---

affirmed, "the rights of all parties shall be determined as if the injunctive provisions * * * had been in full force and effect at all times since May 1, 1980 as to CREF and June 1, 1980 as to LIU." C.A. App. 793. The court of appeals indicated that the provisions of that order would govern with respect to TIAA as well. Pet. App. 37a.

(*id.* at 28a) that "the historical context, the legislative history, and judicial interpretations of that history, [establish] that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.'" The court concluded that, in any event, Section 708 of Title VII, 42 U.S.C. 2000e-7, explicitly preempted state law to the extent the latter might authorize petitioners' discriminatory system (Pet. App. 29a-30a).

Finally, the court of appeals approved and extended to TIAA the district court's grant of injunctive relief precluding use of sex-distinct tables in calculating periodic retirement benefits for persons who retire on or after May 1, 1980 (Pet. App. 30a-37a). It also affirmed the relief awarded against LIU (*id.* at 31a). The court noted that the relief was appropriate in view of the facts that "[t]he equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of [petitioners]" (*id.* at 34a); that the alteration in the amount of future benefits would not alter any settled expectations of male participants and would likely reduce the benefits of only 40% of future male retirees, by 1% to 8% (*id.* at 36a & n.12); and that this Court's decision in *Manhart*, as well as the filing of this and other suits, put petitioners on notice that their method of calculating retirement benefits might be illegal (*id.* at 32a-33a).

4. TIAA-CREF and LIU filed petitions for a writ of certiorari with this Court (Nos. 82-791 and

82-913). On July 6, 1983, the Court granted certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of this Court's decision in *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983). In *Norris*, the Court held that use of sex-based mortality tables to provide a female employee with a lower monthly annuity benefit than that provided to a similarly situated male employee who has contributed the same amount of his compensation constitutes a violation of Title VII. See slip op. 5-17 (Marshall, J.); slip op. 2-3 (O'Connor, J.). However, the Court reversed an order that would have required the employer, the State of Arizona, to provide additional funds to a deferred compensation plan in order to bring the level of benefits payable to women up to the level of benefits contractually guaranteed to similarly situated men. See slip op. 11-13 (Powell, J.); slip op. 3-5 (O'Connor, J.). While the Court recognized that "retroactive relief is normally appropriate in the typical Title VII case" (slip op. 11 (Powell, J.)), it declined to apply its holding retroactively to require equalization of benefits derived from contributions collected prior to its decision. The Court noted that an award of retroactive relief would impose a heavy financial burden on employers and could jeopardize the stability of pension funds by requiring disbursements of "greater annuity benefits than the collected contributions [in the fund could] support." Slip op. 4-5 (O'Connor, J.); slip op. 12-13 (Powell, J.).

Following the decision in *Norris*, petitioners revised their method of calculating retirement benefits so that future contributions would purchase lifetime benefits on a sex-neutral basis. See Pet. 8. Petition-

ers continued to determine benefits derived from pre-August 1, 1983, contributions on a sex-distinct basis (*ibid.*).

5. On remand, the court of appeals analyzed the opinions in *Norris* and concluded that this Court's limitation on relief in that case did not call into question the relief previously ordered in this case (Pet. App. 4a-8a). The court of appeals concluded that "[t]he premise of the *Norris* ruling against retroactivity—that equalization of women's benefits requires the employer or the plan to pay out extra sums of money—is inapplicable to the case before us" because of the "fundamental difference between the plan in *Norris* and the TIAA-CREF arrangements" (Pet. App. 5a). The court of appeals noted that the deferred compensation plan in *Norris* guaranteed a certain stream of income during retirement and therefore depended on the existence of adequate reserves to fund pensions (Pet. App. 5a, quoting *Norris*, slip op. 4-5 (O'Connor, J.)), whereas "the TIAA-CREF plans do not guarantee retirees 'a certain stream of income'" (*ibid.*). The court of appeals observed that in *Norris* equalization could be accomplished only by either reducing the annuity contractually guaranteed to males or requiring the State of Arizona to pay additional amounts into the plan (Pet. App. 7a-8a). Since petitioners provided benefits "based on investment results" in amounts "not ascertainable," the court concluded that equalization "need not be rejected because of any fear that either the employer or [petitioners] will be burdened with any additional financial obligations" (*id.* at 6a).

The court of appeals did note that under its prior order there could be some financial burden on TIAA

if in any year the rate of return on its investments were insufficient to meet the 2½% guaranty provided by the TIAA rate schedule (Pet. App. 9a). The court of appeals therefore directed the district court to modify its judgment "to provide that unisex tables need not be used in calculating the portion of benefits attributable to pre-judgment contributions to whatever extent may be necessary in any year to ensure that the use of such tables will not impose added financial burdens upon the employer or TIAA beyond those resulting from the obligation to pay benefits reflecting a 2½% return on investment" (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 10-16) that the relief ordered by the court of appeals is inconsistent with this Court's decision in *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983), to the extent it requires them to equalize benefits that are based on contributions made before August 1, 1983. They suggest that *Norris* established a per se rule of broad applicability that pre-August 1, 1983, contributions may be used to purchase sex-distinct benefits. In addition, petitioners contend that the relief ordered in this case is inconsistent with the equitable principles underlying the *Norris* decision.

The EEOC argued below that *Norris* did not establish a rule for relief that is automatically transferable to all cases involving sex discrimination in pension plans. Instead, the EEOC urged that the Court's non-retroactivity ruling in *Norris* was based on its concern that requiring employers to equalize benefits by "topping up" women's benefits would be inequitable in the circumstances of that case because it would impose a very significant unanticipated fi-

nancial burden on state and local governments and could threaten the solvency of pension funds. The EEOC pointed out that, in contrast to the employer in *Norris*, petitioners could equalize benefits of men and women without incurring any additional financial burden, since they could redistribute benefits without violating any contractual commitment to beneficiaries (see pages 4-7, *supra*).

Petitioners do not deny that the relief awarded by the court of appeals will not impose any additional financial burden on them. They contend only that it would be unfair to individual male annuitants if petitioners were required to pay benefits based on sex-neutral tables when those benefits are funded from pre-*Norris* contributions. However, both courts below found that such relief would not require petitioners to violate any contractual commitment. See Pet. App. 5a-6a, 34a-36a, 87a & n.28, 89a-90a.[5] As the description in the Statement (pages 4-7, *supra*) indicates, the record supports that finding. In any event, such a fact-bound conclusion would not warrant review by this Court. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[6]

---

[5] The court of appeals expressly modified its judgment to ensure that petitioner TIAA would not be required to violate any contractual commitment or incur any additional financial burdens as a result of paying benefits on a sex-neutral basis. See Pet. App. 9a.

[6] Moreover, we question petitioners' suggestion (Pet. 16) that the relief ordered by the court of appeals would constitute a "severe" inequity for men. It appears that the majority of male beneficiaries of TIAA-CREF plans will not be adversely affected by the court of appeals' decision because they

Petitioners do not cite any decision that has interpreted *Norris* in a manner contrary to the court of appeals' decision in this case. Moreover, since the court of appeals' holding with respect to relief depends to a large extent on the unique features of the TIAA-CREF plans, it is unlikely that any conflict will arise in the future.[7] In these circumstances, we

---

have chosen the option of survivor benefits. See Pet. App. 6a, 36a; C.A. App. 550. Moreover, since 80% of the funds accumulated by TIAA-CREF belong to male participants (EEOC Statement, Exh. P, para. 5, at 3), the effect of equalizing benefits between men and women is not very great for any single male beneficiary. The court of appeals concluded that use of sex-neutral tables for payment of benefits would result in receipt by male beneficiaries of benefits only "slightly lower than whatever they would have been under gender-distinct tables" (Pet. App. 8a). In addition, the court reviewed TIAA-CREF literature and concluded that male participants could not have had any meaningful expectation of receiving benefits based on sex-distinct mortality tables (*id.* at 34a-37a). We note that no male beneficiaries have intervened to contest the terms of the relief ordered by the courts below in this case.

[7] Petitioners suggest (Pet. 12) that if the Court does not grant review there are likely to be inconsistent rulings in cases now pending in other courts. If this should occur, the parties can ask the Court to grant review and resolve the conflict. In fact, the district court concluded that, as a practical matter, the decision in this case would require petitioners to change their practices on a nationwide basis. See Pet. App. 52a. Thus, the issue of relief would be rendered moot in other cases pending against petitioners. Moreover, petitioners' home offices are in New York; their contracts are made and performed in New York; and all benefits are payable in New York. See C.A. App., para. 18, at 196, para. 19 at 507. Thus, the judgment of the court of appeals in this case appears effectively to bind petitioners in any event with respect to the entire TIAA-CREF accumulation funds. Since other pension plans presumably have characteristics that are different from

believe the court of appeals' holding with respect to relief is not of sufficient general importance to warrant review by this Court.

2. Petitioners also seek review of the court of appeals' holding that they are employers within the meaning of Title VII (Pet. 16-17).[8] They contend primarily that that holding conflicts with the decision of the Sixth Circuit in *Peters* v. *Wayne State University*, 691 F.2d 235 (1982), vacated and remanded, No. 82-794 (July 6, 1983), remanded, 718 F.2d 1100 (6th Cir. 1983). In the brief we filed when this case previously was before this Court, we suggested that review of this issue might be warranted because of the conflict between the decisions in this case and *Peters*. However, following the decision in *Norris*, the Court vacated the judgment in *Peters*, and the Sixth Circuit remanded to the district court, where the case is now pending. Thus, at the present time there is no conflict among the courts of appeals on this issue.[9]

---

those of petitioners' plans, and since no other courts have yet issued post-*Norris* rulings on relief, it is not at all clear that the decision below would conflict with decisions in cases pending against other defendants.

[8] Section 701(b) of Title VII, 42 U.S.C. 2000e(b), defines the term "employer" as "a person engaged in an industry affecting commerce * * * and any agent of such a person." Cf., *e.g.*, *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973) (Fair Labor Standards Act); *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (National Labor Relations Act).

The EEOC argued below that petitioners are employers within the meaning of Title VII.

[9] It is unlikely that the conflict with *Peters* will recur. The Court's decision in *Norris* clearly binds colleges and universi-

Moreover, the court of appeals' holding on this issue (like its holding with respect to relief) is largely tied to the facts of this case, in particular the unique character of petitioners' relationship with the educational institutions they serve and the nature of the annuities offered. The court of appeals concluded that petitioners exist solely for the purpose of enabling employer universities to delegate their responsibilities to provide retirement benefits for their employees and are "closely intertwined with those universities" (Pet. App. 24a). Unlike commercial insurance companies, petitioners do not also market their annuities to individual purchasers. In addition, unlike commercial insurance companies, which normally lack discretion to vary the specific dollar amount of the periodic benefits paid to a particular individual, petitioners have promised only to provide an annuity that pays at least the rate schedule benefits (in the case of TIAA) or benefits that vary depending on the success of a portfolio of securities (in the case of CREF). As a practical matter, the actual size of the benefits and the relative distribution between men and women is subject to the discretion of petitioners and is fixed only at the time of retirement. See pages 3-7, *supra*. In these circum-

---

ties prospectively; as a practical matter, petitioners must abandon use of sex-based mortality tables in the future, so that the educational institutions they serve will be in compliance with *Norris*. With respect to pre-*Norris* contributions, petitioners would, as a practical matter, be required to follow the decision below on a nationwide basis. See pages 15-16 note 7, *supra*.

Of course, if a conflict on this issue should reemerge, there will be opportunity to ask this Court to grant review to resolve the conflict at that time.

stances, it is unlikely that resolution of petitioners' status under Title VII would have any broad application to other providers of retirement and insurance plans. Moreover, petitioners themselves have revised their practices to comply with *Norris* in the case of post-August 1, 1983, contributions, so the question has practical significance for them only with respect to the retroactivity question they seek to present in this case. Accordingly, for the same reasons the latter issue does not warrant review by this Court in the absence of a conflict, the "employer" issue similarly does not warrant review.

3. Petitioners also contend (Pet. 18-21) that the court of appeals erred in concluding that the McCarran-Ferguson Act does not bar application of Title VII to them.[10] This question is of limited importance because of Title VII's undoubted applicability to the

---

[10] Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance * * *.

The EEOC argued below that nothing in the McCarran-Ferguson Act prevented Congress from thereafter preempting any state law that requires or allows any act in violation of Title VII. The EEOC noted, inter alia, that Section 708 of Title VII, 42 U.S.C. 2000e-7, provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

universities themselves. Accordingly, since there is no conflict among the circuits on this point,[11] we believe this aspect of the court of appeals' decision also does not warrant further review.

Moreover, while the court of appeals found it unnecessary to reach the question (see Pet. App. 30a), it is doubtful that there is any substantial conflict between Title VII and the requirements of New York insurance law in this case. The State of New York has proceeded expeditiously in allowing insurance companies to implement the sex-neutral standards required by *Norris*. The New York State Insurance Department has advised insurers of an accelerated approval procedure designed to allow them to provide sex-neutral policies in compliance with the August 1, 1983, date set by *Norris*. Circular Letter No. 14

---

[11] Every other federal court that has considered the issue has agreed with the court of appeals in this case that Title VII bars discrimination by an employer or its agent even if such discrimination is sanctioned by state insurance laws. See *Women in City Government United* v. *City of New York*, 515 F. Supp. 295, 302-306 (S.D.N.Y. 1981); *EEOC* v. *Wooster Brush Co.*, 523 F. Supp. 1256, 1264-1267 (N.D. Ohio 1981), aff'd in part and rev'd in part on other grounds, 727 F.2d 566 (6th Cir. 1984); *Hannahs* v. *New York State Teachers' Retirement System*, 26 Fair Empl. Prac. Cas. (BNA) 527, 532-533 (S.D.N.Y. 1981); *Peters* v. *Wayne State University*, 476 F. Supp. 1343, 1350-1351 (E.D. Mich. 1979), rev'd on other grounds, 691 F.2d 235 (6th Cir. 1982), vacated and remanded, No. 82-794 (July 6, 1983), remanded, 718 F.2d 1100 (6th Cir. 1983).

Petitioners suggest (Pet. 19-20) that the court of appeals' decision conflicts with *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979). However, *Cochran* did not involve Title VII or any other labor or civil rights legislation. Rather, it involved the relationship between the McCarran-Ferguson Act and the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*

(July 25, 1983). In addition, the Department has specifically informed insurers subject to its jurisdiction that policies issued under plans subject to *Norris* and Title VII "which utilize gender distinct premium calculations or benefit payments must be amended." Amplification of Circular Letter No. 14 (Sept. 7, 1983).[12] These communications suggest that there is unlikely to be any substantial conflict between the requirements of Title VII, as interpreted by the courts, and the requirements of New York insurance law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission

SEPTEMBER 1984

---

[12] We are lodging copies of Circular Letter No. 14 and the amplification thereto with the Clerk of the Court and providing copies to counsel for the parties.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10045